U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 16Apr2002

CASE NO: 2001 - INA - 153

In the Matter of:
CALDO POMODORO,
Employer

On Behalf of:

VICTOR LOPEZ ZARATE,
Alien.

Appearances: Susan Jeannette
Del Mar, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Holmes, Vittone and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Victor Lopez Zarate ("Alien") filed by Caldo Pomodoro ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act ("the Act"), as amended, 8 U.S.C. § 1182(a)(5)(A), and the regulations promulgated thereunder, 20 C.F.R. Part 756. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco denied the application and the Employer and Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor, and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

The Employer initiated its application for alien labor certification with the United States Department of Labor on March 18, 1998. (AF 17.) The Employer submitted the following job description in its application for alien labor certification:

> Cooks Italian-style dishes, desserts, and other foods, according to recipes. Prepares meats, soups, sauces, vegetables, and other foreign foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies.

Two years experience as a cook and a food-handler's card were required.

The Employer had placed advertisements in the San Diego Tribune and the Sun in April 1997. The Employer also submitted photographs of help wanted notices posted on a community bulletin board, in the windows of the restaurant and local businesses, and in the restaurant's kitchen. (AF-43-56.) The newspaper advertisements produced three applicants who were subsequently interviewed. (AF-47.) Two applicants declined the position because the Employer did not offer benefits and because of the restaurant's location, while the third was rejected for bad work references and lying on his resume.

The Alien had two years experience as a cook and possession of a food-handler's card. (AF-71-72.) The Alien reported his recent employment history as a day laborer in which he was paid in cash for a variety of jobs. (AF-73.) The Alien also stated that he had worked forty hours per week as a cook at Garcia's Mexican Restaurant ("Garcia's") from September 1991 to September 1993. Mrs. Belynn Gonzales, the owner of Garcia's, stated in a July 20, 1996 letter that the Alien began working part-time for her in 1989. (AF-36.)

An April 20, 2001 notice of findings ("NOF") stated that the Alien was unqualified for the

position and that the Employer's recruitment effort was insufficient. (AF-12-16.) Because Mrs. Gonzales stated that the Alien had only worked part-time, the CO found the Alien to be unqualified for failing to meet the required two years of experience. The CO also found that the Employer's recruitment effort was insufficient for failing to coordinate recruitment with the California EDD or through other labor recruitment sources normal to the occupation.

In rebuttal, the Employer submitted an amended ETA Form 750A and a letter from Mrs. Gonzales stating she employed the Alien from July 1989 to September 1993 for twenty hours per week. (AF-19.) A May 21, 2001 letter from Mrs. Concepcion de Maria Garcia Chavez stated that the Alien was a full-time Italian food cook at her restaurant, Comedor Puerta del Sol, from May 5, 1986 to September 30, 1988. (AF-20.) The Employer also offered to re-advertise after removing the following phrase from the requirements for the position, "estimates food consumption and requisitions or purchases supplies." (AF-6-9.)

On June 28, 2001, the CO found that the Employer's rebuttal failed to rebut the notice of findings. (AF-3-5.) Specifically, the CO found that the Employer failed to submit evidence establishing the Alien's qualifications regarding his experience as a full-time chef at Garcia's from 1991 to 1993 and his experience in preparing and managing an Italian menu. The CO noted that the Employer failed to submit a revised ETA Form 750B and evidence which would support the Alien's qualifications, such as pay stubs, tax documents, restaurant menus, inventory checklists and requisition receipts. The letters from Mrs. Gonzales and Chavez were found insufficient without supporting documentation. Accordingly, the application for certification was denied.

On July 21, 2001, the Employer appealed the CO's denial to this Board for review. (AF-1-2.) The Employer argues that it offered to cure its application by re-advertising for the position and that the application was therefore not ripe for a final determination. The Employer further argues that remand is proper because it reasonably misinterpreted the notice of findings due to a lack of specificity.

DISCUSSION

A final determination must identify the section or subsection of the regulations violated and the nature of the violation. *See* 20 C.F.R. § 656.25 (2001). It must rely solely on issues raised and evidence discussed in an NOF.[1] The final determination must also state the reasons for rejecting the employer's rebuttal evidence and arguments. Here, the CO's final determination stated that the Employer failed to satisfactorily rebut the NOF and remained in violation of 20 C.F.R. § 656. The CO explained that the Employer failed to submit persuasive evidence of full-time employment at Garcia's for two years or experience preparing Italian food at Comedor Puerta del Sol.

[1]The NOF did not include "infeasibility to train" as one of the criteria, as it should have, but this is of no consequence as the Alien does not now work for the Employer.

Remand for Re-advertising

If an employer attempts to justify a requirement deemed "unduly restrictive" by the CO, and also expresses a willingness to delete the restriction and re-advertise, and if the CO is not persuaded by the justification, then the CO must offer the employer the opportunity to re-advertise. A. Smile, Inc., 1989-INA-1 (Mar. 6, 1990). Where an employer responds to deficiencies in a NOF by reducing excessive, unrealistic, and restrictive requirements and offering to re-advertise, the CO must allow the employer to re-advertise and re-interview to establish good faith efforts. *See* Rosenblum/Harb Architects, 1994-INA-525 (Mar. 29, 1996). In Rosenblum/Harb Architects, the NOF found the employer's requirement that a secretary be able to type one hundred words per minute to be unreasonably restrictive. Despite the employer's offer to reduce the requirement to seventy words per minute and re-advertise, the CO denied certification. On review, this Board vacated the CO's denial and remanded the matter to allow the employer to re-advertise.

In Ronald J. O'Mara, 1996-INA-113 (Dec. 11, 1997)(*en banc*), the Board held that:

> The holding in A. Smile is a limited one which rests on underpinnings of fairness and due process. It affords an employer to attempt to establish the business necessity for a job requirement and, if unsuccessful, re-advertise the position if the employer has unequivocally agreed to re-advertise in accordance with the requirements set forth by the CO in the NOF.

The Board in O'Mara then enumerated situations where an offer to re-advertise does not cure the cited violation. Similarly, where an employer is merely offering to delete a requirement to allow the alien to qualify for the position, we do not find that fairness and due process require the CO to accept the offer to re-advertise. We find that the CO properly proceeded to issue a final determination denying certification without affording the Employer the opportunity to re-advertise.

Employer's Reasonable Misinterpretation

The Employer's argument that it reasonably misinterpreted the NOF due to a lack of specificity is unpersuasive. Remand would be proper if the CO issued a "catch-all" statement as the basis for his denial which masked the CO's specific objections in the NOF. *See* Motorola Communications & Electronics, Inc., 1991-INA-278 (Feb. 23, 1993); *see also* Gobi Primak, Inc., 1992-INA-161 (Mar. 11, 1993) (remanding for the CO's "lack of specificity"). The CO in this case did not use vague, catch-all statements and was indeed specific in the NOF. The CO attached a three page explanation detailing the general failures in the application (i.e. that the Alien was unqualified and that the Employer's recruitment effort was insufficient). The CO then detailed the specific deficiencies (e.g. conflicting dates of employment, lack of experience cooking Italian foods, timeliness in contacting U.S. applicants, etc.) and required corrections. Accordingly, we find that the NOF put the Employer on notice for the

specific deficiencies of the application and that any misinterpretation on behalf of the Employer was unreasonable.

ORDER

The Certifying Officer's Denial of Certification is Affirmed.

For The Panel:

A
JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.